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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 725

FREDDIE REGALADO TORRES,

Petitioner,

vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner Freddie Regaldo Torres, defendant and petitioner, respectfully prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of California whereby a judgment of the trial court was sustained, affirming a conviction of possession of narcotics. Said judgment was rendered by the Superior Court of the State of California, in and for the County of Los Angeles.

Opinion Below.

The Supreme Court of California rendered its opinion November 16, 1961, in its case No. CR 6908, and a copy of the same is attached hereto in the appendix and is hereby referred to and made a part hereof by reference.

The opinion is reported at 366 P. 2d 823.

Jurisdiction.

1. The judgment of the Supreme Court of California was dated and filed November 24, 1961, and is to be found at 366 P. 2d 823. A copy of the opinion is attached hereto.

2. No extension of time within which to petition for certiorari has been requested.

3. The statutory provisions believed to confer upon this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C. 1257.

Questions Presented for Review and Reasons for Granting the Writ.

1. Torres' apartment was entered by force and without permission, or without a warrant of arrest or a search warrant. The search was unlawful. It violated both the Fourth and Fifth Amendments to the Constitution of the United States; Article I, Section 19 of the California Constitution, and the search was in direct conflict with the rules laid down in the case which established the unlawfulness of searches without the benefit of a search warrant or incident to a valid arrest (*People v. Cahan*, 44 Cal. 2d 434, and subsequent cases, 282 P. 2d 905).

2. The officer violated Section 841 of the Penal Code of California in the manner in which he made the arrest, for he failed to inform the defendant-petitioner of his intention to arrest him, the cause of the arrest, and the authority to make the arrest. The record is silent as to any notice of intention to arrest given by the officer before he broke in the door, in plain violation of Section 841 Penal Code of California, which amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Con-

stitution of the United States. It was in violation of the rules laid down in *Miller v. United States*, 2 L. Ed. 1332, 357 U. S. 301.

Specifications of Error.

(a) Torres' apartment was entered by force and without permission, or without a warrant of arrest or a search warrant. The search was unlawful. It violated both the Fourth and Fifth Amendments to the Constitution of the United States, Article I, Section 19 of the California Constitution, and the search was in direct conflict with the rules laid down in the case which established the unlawfulness of searches without the benefit of a search warrant or incident to a valid arrest (*People v. Cahan*, 44 Cal. 2d 343, and subsequent cases, 282 P. 2d 905).

The question of the unlawful search was properly raised at the preliminary hearing before the committing magistrate by a motion to suppress the evidence [C. T. p. 13], which includes the testimony taken at the preliminary examination and shows the motion. This was further renewed at the time of the trial. At the time of trial a motion was made to suppress the evidence in the form of an objection to the admission of the contraband [Ex. 1]. The objection contained a statement that "I want to object to its admission upon the ground it was obtained as the result of an unlawful search and seizure, in violation of Article I, Section 19, Constitution of the State of California, and of the Fifth Amendment to the Constitution of the United States, and further it was obtained in violation of the rules laid down in *People v. Cahan* and subsequent cases." This was accompanied by a motion to strike the evidence upon the ground that when asked to divulge the name

of the informant, the officer refused so to do. The District Attorney then conceded our motion to strike as to the officer's testimony regarding what the officer did not wish to divulge pertaining to the information obtained from the informant [R. T. pp. 4-5].

(B) The officer violated Section 841 of the Penal Code of California in the manner in which he made the arrest, for he failed to inform the defendant-petitioner of his intention to arrest him, the cause of the arrest, and the authority to make the arrest. The record is silent as to any notice of intention to arrest given by the officer before he broke in the door, in plain violation of Section 841 Penal Code of California, which amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. It was in violation of the rules laid down in *Miller v. United States*, Vol. 2, L. Ed., 357 U. S. 301.

This matter was raised in argument before the trial court and on the motion for new trial, it being contended that no warning was given prior to the entry as required by Section 841[1] Penal Code of the State of California. The Court's attention was called to the case of *Miller v. United States*, 2 L. Ed. 1332, 357 U. S. 301.

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[1]Section 841. (INFORMING PERSON ARRESTED.) The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape.

The Manner in Which the Federal Questions Were Raised and the Rulings Thereon.

The question of the unlawful search and seizure was first raised at the preliminary examination before the committing magistrate, at which time a motion to suppress the evidence was made and argument had thereon [C. T. p. 13], which contains the proceedings at the preliminary examination.

The question on the unlawful search and seizures was raised at the trial itself in the following manner:

At the time the contraband was offered [People's Ex. 1], objection was made to its admission upon the ground that it was unlawfully obtained as the result of an unlawful search and seizure, in violation of Article I, Section 19, of the Constitution of the State of California, Fifth Amendment to the Constitution of the United States, that it was obtained in violation of the rules down in *People v. Cahan.* There was also a motion to suppress the evidence [R. T. pp. 4-5]. At that time a motion to strike the evidence given by the officer for his failure to disclose the name of the informant was made, and at that time the District Attorney conceded that the evidence might be striken [R. T. pp. 4-5]. At both the preliminary examination and the trial, the motions to suppress were denied and the the objections overruled, and the evidence received.

Preliminary Statement.

By an Information filed by the District Attorney of the County of Los Angeles, State of California, your petitioner, Torres, was charged with a violation of Section 11500, Health and Safety Code, in that he was charged that on or about the 21st day of April, 1960, with unlawfully, wilfully, and feloniously having in his possession a narcotic, to wit, heroin [C. T. p. 19]. Motion pursuant to Section 995 of the Penal Code of California, on the ground of the insufficiency of the evidence, was made and denied [C. T. p. 21]. The defendant pled not guilty, and the matter proceeded to trial before the trial court, sitting without a jury [C. T. pp. 22-23]. Objections were made, as hereinbefore indicated, to the admission of the evidence. The motion to suppress was denied, as hereinbefore indicated. The defendant was found guilty. Thereafter, a motion for new trial was duly made and by the court denied [C. T. pp. 25-28]. Thereafter, the defendant was sentenced to the penitentiary for the term prescribed by law, and the matter is now before this Court, following an appeal whicht resulted in affirmation of the judgment and a denial of the motion for new trial.

Statement of the Facts.

It was stipulated that if Officer William King were called to the stand, sworn, he would testify that he was qualified as an expert forensic chemist, that he was employed by the Los Angeles Police Department as a forensic chemist, that he examined certain articles marked WK-1, WK-2, and WK-3, and that as a result he determined they contained a power which, in his opinion, was heroin [C. T. p. 3].

PATRICK WALSH testified he was a police officer employed by the City of Los Angeles, attached to the Narcotics Division, that he was the arresting officer in this case [C. T. p. 2]; (this transcript contains the transcript taken of the proceedings at the preliminary examination, which was received in evidence in this case; the evidence amounting to the testimony taken at the preliminary and additional evidence found in the subsequent and later transcript).

The officer stated he had information that defendant was dealing in narcotics for approximately two years; that he had observed him in the vicinity of Second and Hill and at Third and Hill, in the vicinity of the Grand Central Market; he stated those were known areas as having some frequency of narcotic activity [C. T. pp. 3-4]; that on April 15th, he was parked with two of his partners across from a drug store at Sixth and Alvarado; he observed the defendant drive up in an automobile with two unknown persons who got out of the car and walked to the drug store, that is, the unknown persons did; due to traffic the officers were unable to follow the people when they got back into the car; they went into the drug store and talked to the druggist and he stated that the two persons came in and bought milk, sugar and gelatin capsule; on the night of the arrest, April 21, at approximately 9:00 p.m., he and his partners went to 1320 Burlington, where during the course of a stakeout they observed a known hyp come out of the apartment house [C. T. pp. 4-5]. The place to which they went was an apartment house on Burlington containing approximately 25 apartments [C. T. p. 11]; after going to the second floor and waiting approximately 15 minutes; they entered the apartment and identified themselves; after they

entered the apartment the officer said he noticed a woman running toward the bathroom; he chased her into the bathroom and as he got into the bathroom he noticed white powder on the edge of the bathtub; there were some cups containing white powder on the edge of the bathtub; there was a green plate containing powder and razor blades [C. T. p. 5]; in the toilet he recovered capsules of white powder wrapped in a condom.

It was stipulated the article was found in the apartment [C. T. p. 6]. They also found a rent receipt made out to the defendant; he and Officer Labbee went outside where the defendant gave them a hypodermic outfit that is used by narcotic users; that was outside the apartment; that was People's Exhibit 1 [C. T. p. 6]; they had a conversation with the defendant in the apartment about ten minutes after the narcotics were recovered, and the defendant stated that he had scored for that stuff that afternoon; that was all the stuff he had, and that his wife knew nothing about it [C. T. p. 7]; the statements were free and voluntary [C. T. p. 7].

On cross-examination, the officer stated that he had seen the defendant around Grand Central Market in times past; that was a market place, probably one of the largest markets in Los Angeles, and that every day possibly thousands of people go in and make purchases of merchandise; the market is located at Third and Broadway, next to the Million Dollar Moving Picture Theatre [C. T. p. 8]; he stated that prior to the 16th he had information that the defendant was pushing narcotics, when asked for the source of his information he replied, "From different sources of information, reliable informants." He was then asked, "Would you give me the name of these reliable informants?" His answer was, "No, sir." At that time; counsel for the defendant-

appellant moved for an order by the Court to instruct the officer to give the name of the informants. The Court denied this motion [C. T. pp. 8-9]. On April 16, he saw the defendant drive up to the vicinity of a drug store; the defendant was driving; the drug store was at Sixth and Alvarado; and there two other people in the automobile got out and went into the drug store; the two individuals went into the store and Mr. Torres stayed in the car [C. T. pp. 8-9]; they were unable to follow the persons who went into the drug store and the defendant; they later went into the drug store and asked the druggist what they had purchased, these two people, and the druggiest replied, "Milk sugar and gelatin capsules." [C. T. p. 9]; that on April 29, when they were staked out at 1320 Burlington, the resident of the defendant, he stated he saw a known narcotic type walking out of that location; he could not recall the name of this known narcotic person [C. T. p. 10]; they did not approach the known narcotic person [C. T. p. 10]; neither of the officers went over to the known narcotic person and examined that person as to whether or not his eyes were dilated, whether there were any fresh marks on his hands, or anything; they did none of these things [C. T. pp. 10-11]; some time after seeing this person, they entered the apartment house; it was an apartment house of some 25 apartments; they stated they went straight to the defendant's apartment; some time later, about 15 minutes, the apartment was opened [C. T. p. 11]. The officers stated that as the door was opened by the defendant's wife they identified themselves and went into the apartment; they did not ask whether they could come into the apartment; they just walked in; as the women opened the door she was more or less pinned against

the wall, the door was being opened and the defendant was standing approximately four feet from her; they did not place her or the defendant under arrest at that time; they didn't place them under arrest until after they had found the evidence [C. T. p. 12]; five officers went into the apartment;

The narcotic was then offered in evidence; its receipt and evidence was objected to and a motion to suppress the evidence was made by counsel for the defense [C. T. pp. 12-13]. An objection was made that it was an illegal entry and a subsequent illegal search. The motion to suppress was denied and the objection overruled [C. T. pp. 14-15].

FREDDIE REGALDO TORRES, the defendant-appellant, was then called to the stand [R. T. p. 6]; he stated he was the defendant, he resided at 1330 Burlington; it was an apartment house with some 25 apartments [R. T. p. 7]; that he was living there in one of the apartments; he did not give the officers or anybody permission to enter his apartment; he and his wife were looking at television and his wife was up changing; she was fixing the television at the time, when all of a sudden the door came in through; that just before the door came in, no one outside spoke or said anything; no one said, "This is the police or the Sheriff." No one said they had a warrant for his arrest [R. T. p. 8]; no one asked him to open the door; no one knocked on the door; the door had a small latch on it; the latch was in place but it was loose at the time of the bang; it was locked; the officers hit the door and came in; then a search of the premises was made, and some narcotic was found [R. T. pp. 8-9]; he was not told he was under arrest until after the search

[R. T. pp. 9-10]; he stated he had been in the apartment all day [R. T. pp. 10, 11]; when the officers came in they loosened up the latch on the door [R. T. p. 11]; the door had been opened once when a visitor came and the visitor was in the apartment at the time of the arrest [R. T. p. 15]; the officers came to the door; his wife was about two or three feet away from the door and right by the television set; when the officers pushed the door through to open, they knocked her down; they jumped over her and grabbed him; she was knocked to the floor by the door [R. T. pp. 15-16].

JANET JANE ELIZABETH VENABLE was called and testified she lived at 1320 South Burlington; that it was an apartment house with 36 apartments; she was the manager; that she knew Mr. Torres, he was one of the tenants; she was in her apartment, when he was arrested, on the first floor; she learned that night that Mr. Torres had been arrested; the officers first came to her apartment; they had some conversation with her with reference to where Mr. Torres lived in that apartment house [R. T. pp. 16-17]; they asked the number of his apartment [R. T. p. 18]. The apartment occupied by Mr. Torres was just above her apartment; and within a few minutes after the officers had talked with her she heard a noise or a thud immediately above her apartment; it was only a matter of four or five minutes after the officers left her apartment that she heard the thud [R. T. p. 18]; she became scared and frightened; about ten minutes after this occurred, one of the officers came back to her apartment [R. T. p. 18]. She then went to the apartment with the officer and saw Mr. Torres there [R. T. pp. 18-19].

On cross-examination, she couldn't state whether she had seen Torres that day or not or seen any visitors at the apartment. She went up to the apartment after the officer first came to her apartment; he wanted her key, but she told him the key would not fit [R. T. p. 20]. When the officers first talked with her, she asked them if they had a search warrant to search the apartment, and they replied they didn't require one [R. T. pp. 20-21].

Summary of the Evidence.

The officer testified he had seen Torres in the vicinity of Third and Broadway, at the Grand Central Market, a market frequented by thousands of people each day. The officer then testified he saw Torres drive up to the vicinity of a drug store at Sixth and Alvarado, Los Angeles, two men left the car, went into the drug store; they later lost Torres and these men, and did not see them again. Later, they went into the drug store and talked to somebody whose name they did not know, and this person said that these two men came in the store and bought some gelatine capsules and some milk sugar. Nothing was said on the record as to what that might be used for. They then said they saw some known "hyp" come out of the apartment house; they did not know this person; they did not know the person's name, but they said they knew this person; whether it be male or female, was not stated. They did not examine this person to see whether their eyes were dilated, whether they had fresh marks on them, or any visible evidence of a recent use of narcotics of

any kind, nor was there any conversation with this person. The officers did not know what apartment out of 30 in this apartment house Torres occupied. They went to the manager and asked her which apartment he occupied; she told them it was the apartment immediately over her; the officer wanted her to give him the key to the apartment, but she said her key did not fit. A few minutes after the officer left her apartment, the manager heard a thud, she was frightened. This confirms Torres' statement to the effect that they did not open the door; there was no warning given; the police did not announce who they were, nor the object of their visit; but they forced the door, notwithstanding their statement that the door was open and they walked in. In any event, they had no right to walk in the apartment; they had no reasonable grounds for so doing. Next, we assert they had no reasonable grounds for the arrest of Mr. Torres, and they made the search, not pursuant to a search warrant nor a lawful arrest. They gave no warning, as required by law, before they entered the apartment. They did not arrest Mr. Torres prior to the search. One officer said, "Well, as she opened the door, she was more or less pinned against the wall. The door was opened and the defendant was standing approximately four feet from her." The officer was asked if he arrested her and the defendant at that time, and he said, "No. We didn't place them under arrest until after we found the evidence." [C. T. p. 12].

ARGUMENT.

I.

The Search Was Unlawful. It Violated Both the Fourth and Fifth Amendments to the Constitution of the United States, Article I, Section 19 of the California Constitution, and It Was in Direct Conflict With the Rules Laid Down in the Case Which Established the Unlawfulness of Searches Without the Benefit of a Search Warrant or Incident to a Valid Arrest (People v. Cahan, 44 Cal. 2d 434, and Subsequent Cases, 282 P. 2d 905).

We have carefully summarized the evidence, but so there will be no mistake about it, in a few words, all the officers had before them at the time they entered this apartment was what we will hereinafter set forth. In view of the fact that at the commencement of the trial in the Superior Court a motion to strike the testimony of the officers who refused to disclose the alleged confidential informant was granted by the Court, thus leaving out of the record and leaving out of the consideration which the officer could give to such testimony, at the time of his unlawful entry, there was only the following:

(a) The officer testified that he had seen Torres in the vicinity of Third and Broadway, at the Grand Central Market, a market frequented by thousands of people each day. We respectfully suggest that any intimation that a narcotic peddler, or any other such sort, could hang around that market or loiter in front of the place, defies common knowledge, for one can hardly get by the sidewalks there, with people coming and going, and the merchants and their employees moving

boxes of merchandise, food, meat, fish, produce, in and out of the market almost continuously from the moment it opens until it closes at night.

(b) The officers next say they saw Torres drive up to the vicinity of a drug store at Sixth and Alvarado; two men left the car, went into a drug store; they later lost Torres and these men; did not see them again. Later they went into the drug store, talked to somebody whose name they did not know, or did not give, and this person said that these two men who came in the store bought some gelatine capsules and some milk sugar; nothing was said in the record as to what that might be used for.

(c) They saw some known "hyp" come out of the apartment house; they did not know this person; they did not know the person's name, but they said they knew this person; whether it be male or female, we are still left in the dark; they never stopped this person; they never examined them to see whether their eyes were dilated or whether they had fresh marks on them or any visible evidence of a recent use of narcotics of any kind.

Now, that is the evidence upon which they unlawfully entered this apartment.

The officers did not know what apartment out of 36 in this apartment house Torres occupied; they went to the manager and asked her which apartment he occupied and she told them and it was the apartment immediately over hers; the officer even wanted her to give him a key to the apartment, but she said it didn't fit. A few minutes after the officer left her apartment, she heard a thud; she was frightened. That confirms Torres' statement to the effect that they did not open

the door; there was no warning given; the police didn't announce who they were nor their visit, but they forced the door, notwithstanding their statement that the door was open and they walked in. In any event, they had no right to walk in the apartment; they had no reasonable grounds for so doing.

Next, we assert that they had no reasonable grounds for the arrest of these people, and they made the search, not pursuant to a lawful arrest, for no lawful arrest was ever made. These people were not arrested until after the search had been made and the narcotic found and the officer so testified. As the officer said,

> "Well, as she opened the door, she was more or less pinned against the wall, and the door was opened and the defendant was standing approximately four feet from her.
>
> Q. Did you arrest her and the defendant at this time? A. No, we didn't place them under arrest until after we found the evidence." [C. T. p. 12.]

After long years of struggle by those who have fought for the rights preserved by our Constitution and its Amendments, *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, came along, which is a landmark in the enforcement of the law and the preservation of our constitutuional rights in the State of California, and has been recognized, not only here but, elsewhere as such.

In *Elkins v. United States* (decided June 27, 1960, by the Supreme Court of the United States), 364 U. S. 216, the Court said:

> "The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *Peo-*

ple v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905. 'We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.' 44 Cal. 2d 434, at 445, 282 P. 2d 905, at 911, 912, 913.

"The chief law enforcement officer of California was quoted as having made this practical evaluation of the *Cahan* decision less than two years later:

> "'The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.'"[2]

[2]The above is an excerpt from letter of Governor Edmund G. Brown, then Attorney General of the State of California, to the Stanford Law Review, quoted in Note 9, Stan. L. Rev. 515, 538 (1957). See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan, 43 Cal. L. Rev. 565, 586-588 (1955).

As was said by the United States Supreme Court as late as June 27, 1960, in *Elkins v. United States, supra*, 364 U. S. 206:

> "The movement towards the rule of exclusion has been halting but seemingly inexorable. Since the *Wolf* decision one state has switched its position in that direction by legislation (North Carolina) and two others by judicial decision (Delaware and California). Another State, uncommitted until 1955, in that year adopted the rule of exclusion (Rhode Island). Significantly, most of the exclusionary States which have had to consider the issue have held that evidence obtained by Federal Officers in a search and seizure unlawful under the Fourth Amendment must be supressed in a prosecution in the State Courts. *State v. Arregui*, 44 Idaho 43, 254 P. 788; *Walters v. Commonwealth*, 199 Ky. 182, 250 S.W. 839; *Little v. State*, 171 Miss. 818, 159 So. 103; *State v. Rebasti*, 306 No. 336, 267 S. W. 858; *State v. Hiteshew*, 42 Wyo. 147, 292 P. 2; see *Ramirez v. State*, 123 Tex. Crim. 254, 58 S. W. 2d 829. Compare *Rea v. United States*, 350 U.S. 214."

It is our earnest contention that *Mapp v. Ohio*, 29 L. W. 4798, 6 L. Ed. 1081, is ample authority for the granting of certiorari in this case and the reviewing of this entire proceeding in this all-important question of search and seizure and its reflection upon the case of *People v. Cahan*, heretofore referred to and reported at 44 Cal. 2d 434, 282 P. 2d 905. The instant decision, page 4, holds that the Court "may take judicial notice that capsules and milk sugar are used in the processing of narcotics." Such a conclusion is error, we say, and

under no circumstances could the Court finally substitute its opinion for what the officer knew at the time he forcibly entered the apartment.

II.

The Officer Violated Section 841 Penal Code in the Manner in Which He Made the Arrest, for He Failed to Inform the Defendant-Appellant of His Intention to Arrest Him, the Cause of the Arrest and the Authority to Make the Arrest. The Record Is Silent as to Any Notice of Intention to Arrest Given by the Officer Before He Broke in the Door, in Plain Violation of Section 841 Penal Code, Which Amounts to a Denial of Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States.

The search and seizure in this case was aggravated by the conduct of the officers who plainly violated Section 841 of the Penal Code. They had no warrant of arrest; they had no search warrant, and without warning of any kind. To be sure, they say then entered—walked in—the facts belie this.

Recently this subject has been studied and a most learned decision rendered in *Miller v. United States*, Vol. 2, L. Ed., Supreme Court Reports, p. 1332, 357 U. S. 301, where the history of the manner of giving notice before breaking has been fully reviewed, and the failure of the officers in following a provision in the District of Columbia very similar to ours, in breaking, entering and searching and seizing, was reversed.

The District Court of Appeal, in passing upon our contention that the evidence was inadmissible because of violation of Section 841 of the Penal Code by the

officers, states that clearly the record in this case brings the case within the statutory exceptions (see, *People v. Beard*, 46 Cal. 2d 278, 281; *People v. Herman*, 163 Cal. App. 2d 821, 826; *People v. Jaureque*, 142 Cal. App. 2d 555, 562).

It is our contention that the information in the possession of the officer at the time of the forcible entry of this apartment and his failure to announce their intentions, as required by Section 841 of the Penal Code, warrants a reversal. None of the facts known to the person, as this record now discloses, put the case within the statutory exceptions. By reading *Miller v. United States*, Vol. 2, L. Ed., *supra*, and the cases therein referred to, and the statutes referred to herein, it appears that a substantial number of the States have enacted a statute similar to 841, and is substantial authority for the proposition that the conduct of the officers was unwarranted and amounted to a denial of due process of the Fourteenth Amendment to the Constitution of the United States.

Recently, the United States Circuit Court (9th Cir.), in the case of *Eng Fung Jem v. U. S. A.*, No. 16644, decided August 10, 1960, in reversing an order of the District Court which refused a motion to suprpress where on information given by an informant the officers entered a hotel room and seized narcotics, the Government contending that appellant was about to leave and thus the urgency justified the entry, said, quoting *United States v. Jeffers*, 342 U. S. 48:

> "The officers could have easily prevented any such destruction or removal by merely guarding the door."

Conclusion.

The evidence plainly shows that the officers did not know the name of the person whom they saw come out of the apartment house, they did not know the number of the apartment, out of thirty-six, occupied by Torres. This testimony was not denied; in fact, the officers did not deny that they went to the landlady and asked her which apartment Torres occupied [R. T., pp. 16-18]. The apartment occupied by Mr. Torres was just above her apartment, and within a few minutes after the officers had inquired from her which apartment Torres occupied, she heard the noise and the thud. It was only a matter of four or five minutes after the officers left her apartment that she heard the thud. In about ten minutes after this occurred, one of the officers came back to her apartment [R. T. p. 18]. She then went to the apartment with the officer and saw Mr. Torres there. There is nothing in this record to justify this search without a warrant.

We respectfully ask the Court to grant Certiorari to the end that this all important decison may be reviewed and reversed, in order that justice and uniformity of law may prevail with reference to search and seizures.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner.

APPENDIX.

Opinion of the Supreme Court.

In the Supreme Court of the State of California, In Bank.

The People of the State of California, Plaintiff and Respondent, v. Freddie Regaldo Torres, Defendant and Appellant. Crim. 6908.

Filed Nov. 16, 1961.

The court, sitting without a jury, found defendant guilty of possessing narcotics in violation of section 11500 of the Health and Safety Code, and he appeals, contending that illegally obtained evidence was used against him.

Officer Walsh, a member of the narcotics division of the Los Angeles Police Department, testified that he observed defendant in the vicinity of 3rd and Hill Streets in Los Angeles, an area "having some frequency of narcotic activity," and "a known hangout for narcotic users and pushers." He also saw defendant drive an automobile to 6th and Alvarado Streets accompanied by two persons who got out of the car, entered a drugstore located there, and purchased some milk sugar and gelatin capsules. Six days later, Walsh and four other officers saw a known user of narcotics leave defendant's apartment, the location of which they had previously ascertained. They immediately went into the apartment building and stood outside defendant's door for 15 or 20 minutes without knocking or attempting to enter. While they were standing there, the door was opened by defendant's wife, and the officers, seeing defendant in the room a few feet from her, identified themselves as policemen and stepped into the apartment.

A woman ran in the direction of the bathroom and Walsh, who followed her there, discovered several capsules in the toilet with white powder in them, later identified as heroin, and some cups on the edge of the bathtub which also contained heroin. Walsh then arrested defendant, who stated that he had acquired the narcotics that afternoon. At the trial the narcotics were admitted into evidence over defendant's objection. The officers did not have a search warrant or a warrant of arrest.

A search without a warrant is proper where it is incident to a lawful arrest based on reasonable cause to believe that the accused has committed a felony. Such a search is not rendered unlawful merely because it precedes rather than follows the arrest. (People v. Hanimond, 54 Cal. 2d 846, 853; People v. Ingle, 53 Cal. 2d 407, 413.) Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty. The test is not whether the facts on which the officer relies are sufficient to convict, but only whether the person should stand trial. (People v. Ingle, 53 Cal. 2d 407, 412-413; People v. Fischer, 49 Cal. 2d 442, 446.)

As we have seen, before the officers entered defendant's apartment they knew that he had been in an area which was a "hangout" for users and sellers of narcotics, that he drove two men to a drugstore who purchased milk sugar and gelatin capsules, and that a known addict had visited his apartment. While the only evidence connecting the substances purchased at the drugstore with the preparation of narcotics is that the capsules in the present case had heroin in them,

many cases indicate that capsules are used as containers for heroin (see *e.g.*, People v. Salcido, 154 Cal. App. 2d 520, 521; People v. Ruiz, 146 Cal. App. 2d 630, 632; People v. Bigelow, 104 Cal. App. 2d 380, 384; People v. Shafer, 101 Cal. App. 2d 54, 56-57), and others state that milk sugar is employed to cut heroin (People v. Dixon, 46 Cal. 2d 456, 457; People v. Garcia, 187 A. C. A. 129, 134). A court may take judicial notice of a fact which is of common knowledge and is certain and indisputable (Communist Party v. Peek, 20 Cal. 2d 536, 546; Varcoe v. Lee, 180 Cal. 338, 342 *et seq.*), and under this rule we may take judicial notice that capsules and milk sugar are used in the processing of narcotics.

It has been said that the circumstance that several addicts leave a residence warrants the inference that there is a supply of narcotics there (see People v. Williams, 175 Cal. App. 2d 774, 775-776), and, although in the present case only one addict was seen leaving defendant's apartment, there was other evidence indicating defendant's guilt. The fact that milk sugar and gelatin capsules were purchased in combination was strongly indicative that they were to be used in connection with narcotics, and in view of the officers' previous knowledge regarding defendant, it was not unreasonable for them to believe that the purchase was made for defendant's use and that the purpose of the addict's visit related to narcotics in defendant's possession.

The police did not seek to enter the apartment as soon as the addict left but waited outside, apparently hoping to learn other details of defendant's activities. As the door was opened, they could see defendant in the room a few feet away, and it is, of course, proper for

officers to seek interviews with suspects or to call upon them at their homes for that purpose. (People v. Michael, 45 Cal. 2d 751, 754.) The officers identified themselves, and no objection was made to their entry. When they saw the woman running toward the bathroom, they were justified in concluding that she was attempting to dispose of narcotics.

Under the circumstances we conclude that the officers acted reasonably and that the evidence was properly admitted.

The judgment and the order denying a new trial are affrmed.

Gibson, *C. J.*

We concur:
Traynor, *J.*
Schauer, *J.*
McComb, *J.*
Peters, *J.*
White, *J.*
Dooling, *J.*